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Filed Electronically

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

Re: *In re Joint Petition for Expedited Rulemaking to Resolve Carious Outstanding
Issues Concerning the Implementation of the Communications Assistance for Law
Enforcement Act*
Notice of *Ex Parte* Communication in RM-10865

Dear Ms. Dortch:

This letter provides notice pursuant to Section 1.1206(b) of the Commission's rules that Stewart A. Baker and Emily Hancock, counsel to the ISP CALEA Coalition, and Kate Dean of the US ISP Association on July 6, 2004 met separately with Jessica Rosenworcel, legal advisor to Commissioner Michael J. Copps, and with Matthew Brill, legal adviser to Commissioner Kathleen Q. Abernathy, and Matthew Benz of Commissioner Abernathy's staff to discuss the Coalition's concerns about the petition for rulemaking on outstanding CALEA issues requested by the Department of Justice, Federal Bureau of Investigation, and the Drug Enforcement Administration.

The purpose of these meetings was to express the Coalition's concern about a premature resolution of important issues in the context of a declaratory ruling concerning what technologies are covered by CALEA. Primarily, the Coalition is concerned that the Commission not prejudice the question of when services are information services or a "replacement for a substantial portion of the local telephone exchange service."

The attached presentation and a compilation of publicly available CALEA source materials were distributed at each meeting, and an additional copy of the ISP CALEA Coalition's Comments on above-named the Joint Petition was e-mailed to Ms. Rosenworcel following the meeting. Please direct any questions to the undersigned.

Respectfully submitted,



Stewart A. Baker

Attachment

cc: Matthew Brill
Jessica Rosenworcel

Risks of Issuing a Declaratory Ruling on CALEA Without Further Comment

The FCC should not issue any declaratory ruling concerning technologies covered by CALEA at this stage in the proceeding. There is a significant risk that any such ruling will create a precedent by adopting legal theories that decide much more than the particular technology addressed by the ruling. These theories would then become precedents that bind the Commission's review of later technologies.

As an example, a declaratory ruling that "push-to-talk" technologies are subject to CALEA could create two dangerous precedents. First, the NPRM would have to conclude that push-to-talk voice is not an information service, even though many current "push-to-talk" services are IP-based and cannot be easily distinguished from other kinds of VOIP. Thus, the ruling would run the risk of effectively deciding the entire VOIP question, not simply push-to-talk

The precedential effect could be even broader than that. In a ruling that IP-based "push-to-talk" is subject to CALEA, the Commission would have to explain why that technology is different from the technology in *pulver.com*. Any such explanation, in turn, will likely begin a line-drawing exercise with respect to covered and uncovered IP voice services. To draw that line without public comment and careful briefing is dangerous.

A second precedent is also highly likely. To cover "push-to-talk" services, the Commission will likely be tempted to conclude that these services are a "replacement for a substantial portion of the local telephone exchange service." But VOIP push-to-talk has only been in the market for a brief period of time. Its market penetration is very small. Treating such a nascent technology as a "replacement" for the PSTN would set a precedent that technologies can become "substitutes" for the PSTN within months of deployment. This is not just an improperly low standard applying CALEA; it would also retard innovation. Anyone with a new voice service would fear being challenged as a PSTN substitute as soon as the first customer signs up. To avoid that risk, innovators will be forced to seek at least an informal approval from the FCC and/or FBI before deployment. This would give the FBI, through the back door, a veto over new technology deployments -- an authority that most would consider inappropriate.

We recognize that intercepts of push-to-talk are a great concern to law enforcement. But it is our understanding that all push-to-talk vendors have already launched technologies to achieve CALEA compliance, and it is not clear that a declaratory ruling at this stage will speed that process, which is already moving as fast as reasonably possible. (At any rate, before concluding that precipitous Commission action will actually affect deployment, the industry should be asked for information on that question.)

-Submitted on behalf of ISP CALEA Coalition